

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 29, 2009

STATE OF TENNESSEE v. THOMAS WALTER LOCKHART

Appeal from the Criminal Court for Sullivan County
Nos. S48,278; S48,279; S48,334 R. Jerry Beck, Judge

No. E2008-01712-CCA-R3-CD - Filed August 5, 2009

The Defendant, Thomas Walter Lockhart, appeals from the Sullivan County Criminal Court's probation revocation for his effective sentence of three years, one month, twenty-seven days after he was convicted of possession of legend drugs, a Class C misdemeanor, possession of a weapon with intent to go armed, a Class C misdemeanor, stalking, a Class A misdemeanor, assault, a Class A misdemeanor, and possession of drug paraphernalia, a Class A misdemeanor. He claims that the trial court erred in revoking his probation and ordering him to serve his sentences in incarceration. We hold that the trial court did not abuse its discretion, and we affirm its judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Stephen M. Wallace, District Public Defender; and Joseph F. Harrison, Assistant Public Defender, for the appellant, Thomas Walter Lockhart.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; James Franklin Goodwin, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the revocation hearing, Charles Wesley Sutton, Jr. testified that he was the Defendant's probation officer. He said he did not review the rules of probation with the Defendant because that had been done by the Defendant's previous probation officer. He said he filed a violation warrant against the Defendant on March 27, 2008, in which he alleged that the Defendant violated Rule 10 prohibiting assaultive, abusive, threatening or intimidating behavior. He said he took this action after receiving information that the Defendant threatened Tami Harrison, William Jankowski, and Leslie Jankowski. He said he filed a second violation warrant on May 1, 2008, in which he alleged that the Defendant violated Rule 5 prohibiting the Defendant from changing his residence without informing his probation officer. He said he filed this warrant after calling the Defendant's stated

residence and being informed by Tami Harrison, the Defendant's ex-fiancée, that the Defendant no longer lived there. He stated that the second warrant also alleged a violation of Rule 7, which prohibited the use of intoxicating beverages and drugs, after he received a laboratory report from Woodbridge Hospital.

Tami Louise Harrison testified that she had been engaged to the Defendant. She said that on January 29, 2008, she asked the Defendant to leave the home they shared after he admitted using cocaine, and that from that time through March 27, 2008, the Defendant subjected her to "constant harassment." She said she had call logs showing that he called her over 350 times in an eight-week period and that she saved twenty or twenty-five of the voice mail messages the Defendant left. She said that the Defendant made statements that if he could not have her then no one else would, that he accused her of having sexual relations with other men, that he saw her car at crack houses, and that they were "not over." She denied that she contacted the Defendant and said that his telephone calls to her were unwanted. She said that the Defendant also came to the residence, looked through the front door window, and knocked on her bedroom window. She said that she called the police twice and that she eventually sought and obtained an order of protection. She said that she advised the Defendant several times that she was going to seek the order of protection before going through with it. She said that the Defendant took some of his clothing and belongings with him when he left the home but that many of his other things remained at her house, despite her requests for several months that his family remove the belongings. She said that the Defendant moved into his mother's home and that he placed some of the calls to her from his mother's telephone.

Ms. Harrison testified that although she never saw the Defendant use drugs, she was familiar with his demeanor and behavior when he was using drugs and that she noticed changes in his behavior before she told him to leave the home. She said that he stayed up all night, slept all day, would be "hyper" and then "crash," spoke "funny," and his mouth "drew down."

Ms. Harrison testified that she was not the victim in any of the previous orders of protection that had been issued against the Defendant. She said that in mid-February, she received a voice mail message on her cellular telephone in which the Defendant stated, "If Charles calls you and asks you if I am still living there please tell him that I am 'cause I can get into a lot of trouble for that." She identified a document dated March 6, 2008, bearing what she recognized as the Defendant's signature in which the Defendant stated he was living at the same address Ms. Harrison had previously testified was that of her home.

Using her cellular telephone, Ms. Harrison played numerous voice mail messages left for her by the Defendant. One of these included the message in which the Defendant asked her to say that he was still living at her home.

Ms. Harrison testified that when she and the Defendant were together, he worked as a delivery truck driver for Sears and as an umpire for the Kingsport Athletic Department and the Johnson City Athletic Department. She said they split the expenses equally, including the house payment. She said the house belonged to her parents and was to be her home with the Defendant when they were married. She said that about six weeks before she asked the Defendant to leave, he

lost his job with Sears. She said that when the Defendant worked at Sears, he brought home several large items, including electronics, appliances, and exercise equipment.

Ms. Harrison acknowledged that she had discussed the facts of the case with her brother William Jankowski and sister-in-law Leslie Jankowski. She denied that they had collaborated to concoct a story in order to keep a large-screen television set and other personal property the Defendant brought into the home.

William Thomas Jankowski testified that Tami Harrison was his sister who had been engaged to the Defendant. He said that he recognized the Defendant's voice on the telephone and that he had conversations, mostly by telephone, with the Defendant between January 2008 and March 27, 2008. He said that he called the Defendant on occasion, but that when he did, he was returning the Defendant's calls. He said that the Defendant told him to stay out of his sister's relationship with the Defendant. He also stated that the Defendant expressed desires to "punch [him] out," to "hurt [him]," and to "slap [his] wife down." He said that the Defendant told him on Easter 2008 that the Defendant would kill him and that the Defendant said he had killed three other people. He said that the Defendant made statements to the effect that Ms. Harrison was his property and that if the Defendant could not have her, no one else could. The witness stated that the Defendant said that he was going to hurt Ms. Harrison in order to teach her a lesson. The witness said that he was scared for his sister and himself. He said that his sister was scared and upset by the Defendant's actions over Easter weekend.

Mr. Jankowski testified that sometime between January and March, the Defendant admitted having problems with cocaine and methamphetamine. He said they discussed attempting to find help for the Defendant.

Mr. Jankowski testified that he tried to be a friend to the Defendant and to arbitrate between his sister and the Defendant but that the Defendant's behavior became more erratic over time, culminating in things being out of control by Easter. He said that ten minutes after the Defendant threatened to kill him on Easter, the Defendant called him again, sobbing and asking to borrow money for the Defendant's children's Easter baskets. He said this was right before the Defendant was admitted to Woodridge Hospital.

Mr. Jankowski testified that he shot but did not kill a gang member who was robbing him in 2002 and that he had a gun permit. When asked whether he told the Defendant that he had killed five people and would kill the Defendant with a gun, he said, "[T]hat's berserk."

Mr. Jankowski acknowledged that he took Oxycontin for a leg condition and that he had taken it on the day of his testimony. He said that Ms. Harrison's son "may have" stolen a bottle of Oxycontin from him but that he was not able to prove it. He said that Ms. Harrison's son Jarred lived with Ms. Harrison in the home she used to share with the Defendant. He said that he had no knowledge whether Jarred used Oxycontin.

Leslie Ann Jankowski testified that Tami Harrison was her sister-in-law. She said that on the weekend of Easter 2008, she had a conversation with the Defendant in which he said, "I'll take

care of you,” after she said that she was going to talk to the district attorney and the Defendant’s “parole officer” about the fact that the Defendant was no longer living with Ms. Harrison. She said that she felt threatened by the Defendant’s statement.

Ms. Jankowski testified that she remembered a conversation with the Defendant in which he wanted to meet with Mr. Jankowski to fight and that the winner would receive Ms. Harrison as the prize. She said that in her opinion, Mr. Jankowski did no more than take care of himself in his conversations with the Defendant. She said that Mr. Jankowski never threatened to kill the Defendant or to come to the Defendant’s mother’s home to get the Defendant.

Charles Sutton was recalled as a defense witness and testified that he supervised the Defendant from April 2006 until the Defendant was taken into custody on March 28, 2008. He said that the Defendant had been current on his probation fees until he was taken into custody, that the Defendant paid court costs, that the Defendant attended all his supervision meetings, and that the Defendant completed the required mental health evaluation and received any required treatment.

Mr. Sutton testified that he recalled the Defendant’s saying he wanted to move but that he did not recall a conversation about the Defendant’s moving to an apartment in the Bloomingdale area of Kingsport. He said he never approved the Defendant’s moving. He did not recall telling the Defendant that he considered the location of the Defendant’s belongings to be the Defendant’s residence. He said that he told all of the probationers under supervision that he would not approve a residence until he first investigated it. He said that in January, February, and March of 2008, the Defendant completed forms listing his address as the one previously identified by Ms. Harrison as her home.

Deborah Begley testified that she was the Defendant’s ex-wife. She said that she knew Ms. Harrison’s voice and that she talked with Ms. Harrison while the Defendant was in Woodridge Hospital. She said that Ms. Harrison accused her of having sexual relations with the Defendant after the witness was married to her present husband, which she said was untrue. She said that at one time, she had to get an order of protection against the Defendant.

Tami Harrison was recalled by the defense and acknowledged that she had called the Defendant after telling him to leave her home in January. She stated, however, that she was returning his calls on these occasions. She admitted that she likely said threatening or ugly things to the Defendant when she was angry over his harassment of her. She acknowledged exchanging text messages with the Defendant and stated that this form of communication was easier than speaking with him. She acknowledged that after the Defendant’s ex-wife called her repeatedly, she sent a text message that said, “I will rip her f----- eyes out if she ever calls me again. Don’t you call me either. I hate all of you. You got your war.” She denied ever asking the Defendant to meet her but acknowledged sending a text message asking if he could come at a certain time, which she said was in response to his request to retrieve some of his belongings from her basement. She said that she encouraged the Defendant to seek help for his drug problem. She denied that the real source of problems in her relationship with the Defendant was her jealousy of his ex-wife. However, she admitted sending the Defendant a text message in February 2008 that said, “I’m sick and going to bed. I can’t deal with your ex. She will always have a hold on you. Get her f----- name off your

leg.” She admitted that she heard rumors that the Defendant and Ms. Begley had sexual relations after Ms. Begley remarried but denied telling Ms. Begley that she would “get” the Defendant and would have him put in jail.

On cross-examination by the State, Ms. Harrison testified that when she sent the text messages quoted above, she was responding to previous messages sent by the Defendant. She said that with respect to the one referencing a war and the one referencing the Defendant’s ex-wife, she was frustrated by the chain of events. She said that she remained hopeful for a while that the Defendant might get help and that they would be able to resolve their differences but that the situation deteriorated in mid-February. She said that she only spoke with Ms. Begley after Ms. Begley’s daughter called her. She said that Ms. Begley called her repeatedly and threatened that if the witness and the Defendant resumed their relationship, she would never be allowed around Ms. Begley’s children.

The trial court found that the Defendant violated two of the terms of probation: conducting abusive, threatening or intimidating behavior and failing to report his change of residence. The court found that the State failed to prove by a preponderance of the evidence that the Defendant used drugs in violation of a term of probation. The court found that either of the two violations was sufficient to revoke the Defendant’s probation.

The Defendant then testified before the trial court imposed a sanction for the revocation. He stated that when he was brought into custody, he was placed in a jail cell with felony offenders despite the fact that he had only misdemeanor convictions. He said that he brought this to the attention of Lieutenant Salyers but that the officer got mad and told him to “shut up” and called him a liar. He said that while in the cell with felony offenders, he was sexually harassed, sexually assaulted, set on fire, beaten, and choked. He said that he did not report the abuse immediately because he would be labeled a “snitch” but that he eventually did so.

The Defendant testified that if he were released, he would not have any contact with Ms. Harrison or her family. He said that he did not understand why they betrayed him and told lies about him. He said he had forgiven them and hoped that they forgave him, as well. He said he would have someone else arrange the retrieval of his belongings. He said that he was willing to move to Missouri, where he had a job offer, or Chicago, where he had family, if he were released and a transfer of supervision approved.

On cross-examination, the Defendant acknowledged that in the past, he had a lot of “trouble” in his life, although he could not recall whether he had been on probation on five past occasions. He admitted receiving a suspended sentence and being told he could have no contact with “Deanna,” but he stated that this was because she “ran off with her best friend’s husband and took [his] three children that [he had not] seen in 13 years.” He admitted prior convictions for trespass and DUI. He first denied that he was convicted of assault of Deanna Parrott but then stated that he had been in and out of mental institutions and that no one tried to help him. He said that he had done some bad things in his life but that some of his convictions were the result of women who told lies about him. He said that in the present case, he “did not do this stuff.” The Defendant stated that he remembered his probation being revoked but being returned to probation supervision in 2003. He

acknowledged having trouble in the past with women other than Ms. Harrison but stated that he did not have proper medication at the time of those incidents. He said he eventually found out that he was bipolar and borderline schizophrenic and that he did not have problems when he took his medication.

After the Defendant's mitigation proof, the trial court found that the Defendant should serve his sentences in jail. The court noted the Defendant's prior record as determinative of the issue.

The Defendant argues in the appeal that the trial court erred in revoking his probation and ordering him to serve his sentence in confinement. He claims that the violations found by the trial court resulted from the dissolution of his relationship with his fiancée and not from a willful intent to violate the probation terms. He also claims that the court failed to consider any of his mitigating proof in ordering him to serve his sentence in confinement. The State responds that the trial court did not abuse its discretion.

Relative to when a trial court may revoke probation and to the standard of review in an appeal of such an action, in State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991), our supreme court stated:

We take note that a trial judge may revoke a sentence of probation or a suspended sentence upon a finding that the defendant has violated the conditions of his probation or suspended sentence by a preponderance of the evidence. T.C.A. § 40-35-311. The judgment of the trial court in this regard will not be disturbed on appeal unless it appears that there has been an abuse of discretion. State v. Williamson, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981). In order for a reviewing court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred. State v. Gear, 568 S.W.2d 285, 286 (Tenn. 1978); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980).

If a trial court revokes a defendant's probation, its options include ordering a defendant to serve the sentence in confinement. T.C.A. § 49-35-310; see State v. Hunter, 1 S.W.3d 643, 648 (Tenn. 1999).

The record reflects that the victim of the stalking and assault convictions for which the Defendant was on probation was a fourth individual, in addition to the three victims who testified at the revocation hearing that the Defendant harassed them. The Defendant acknowledged his abysmal criminal history, although he failed to accept responsibility for it in part by claiming that some of his victims had lied about the offenses. In addition, the record supports the trial court's determination that the Defendant failed to notify his probation officer of his change of residence. The record reflects that after Ms. Harrison told him to leave her home, he misrepresented his true residence to his probation officer on multiple occasions and that he asked Ms. Harrison to lie for him

about where he was living. The record also reflects that the trial court acknowledged the Defendant's mitigation proof but found that it was outweighed by the factors favoring revocation and confinement. We hold that the trial court did not abuse its discretion in revoking probation and ordering the Defendant to serve his sentence in confinement.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE